



**ARKANSAS
Workforce Investment Board**

POLICY MANUAL

AWIB Policy # _____

Effective: Program Year 2009

SUBJECT

Procurement and Contract Policy

APPROVED

April 14, 2009

General Information

Of interest to

The Arkansas Workforce Investment Board and other entities engaged in implementing workforce programs under the Workforce Investment Act (WIA) submit this guidance document

Regarding

Procurement and Contract Policy

Effective date

Upon Issuance

To be established through Underlying State/Federal Policy,

Grantees, subrecipients, and contractors funded under the Workforce Investment Act, {hereinafter “WIA”}, whether in whole or in part, must abide by the Workforce Investment Act of 1998, the WIA Regulations, all applicable Office of Management and Budget [OMB] circulars, state regulations in law and rules [Arkansas Code Annotated and State of Arkansas Procurement Law and Regulations], Office of State Procurement [OSP], Department of Finance and Administration [DFA], and the Arkansas Workforce Investment Board [AWIB] established policies..

Purpose(s)

The overall purpose of this document is to establish the state procurement process as it applies to the administration of all procurement actions involving WIA funds in the State of Arkansas.

The specific purpose of this policy is to clarify proper governance and guidance in procurement standards for WIA funds in conjunction with the laws of the State of Arkansas applicable to all state agencies and to allow supplementation of state procurement law where WIA guidelines are not established or non-determinable and left to the state’s discretion.

For no reason shall this document or applicable state governance regarding WIA funds be interpreted to supersede, in any manner, the power and governance of federal laws or regulations, but to work in accordance with such laws within state and federal constitutional guidelines.

Minimum procurement standards are established to:

- (1) Ensure that all purchases and contractual agreements made with public, WIA funds are conducted in the most efficient, economical, and ethical manner and are in compliance with all applicable laws and regulations; and
- (2) Simply, clarify, and modernize the law governing procurement within WIA regulations by this state; and
- (3) Permit the continued development of procurement policies and practices in accordance with federal and state law; and
- (4) Provide public confidence in the procedures followed by this agency in all procurement activities; and
- (5) Establish fair and equitable treatment standards for all persons and entities engaging in the procurement system of this state through this agency; and
- (6) Foster increased and effective, “Full and Open” competition to enhance economic growth and sustainability in the state pertaining to workforce investment activities; and
- (7) Provide safeguards for the maintenance of a procurement system of quality and integrity within WIA guidelines and all applicable state and federal laws.

Definitions

All definitions shall be established and governed in accordance with Federal and State Laws regarding procurement.

General Guidelines**A. General Guidelines**

- (1) Requirements for procurement for state and local grantees and subgrantees are listed in 29 CFR.97.36.
- (2) All procurements for non-Federal funds must be followed in addition to all Federally required clauses for all purchase orders and other agreements.
- (3) All other governmental grantees and subgrantees must follow the requirements of 29 CFR 97.36(b) through (i) as stated below:
 - a. Subrecipients and their subcontractors shall use their own procurement procedures reflective of the laws and regulations of the State of Arkansas provided that such procedures are in compliance with the requirement under State Level Procurement WIA Sec. 171 and 172.
 - b. Grantees and subgrantees must maintain a system of administration of contracts, including written procedures that address the following:
 - i. A contract administration system to ensure required contract performance;
 - ii. A written code of conduct for employees under the contract regarding administration of agreement and conflict of interest provisions;
 - iii. A detailed procedure for review of prospective procurements;
 - iv. A process that promotes use of intergovernmental agreements for procurement, common goods, or use of Federal and State excess a surplus when possible;
 - v. A process that ensures awards made only to responsible contractors with the ability to successfully fulfill the contract;
 - vi. Documentation of the procurement process for every award or contract, including the rationale for method of procurement, selection and rejection criteria, and basis for contract price as well as independent agency estimates; and
 - vii. Dispute procedures regarding award and administration of contracts, remedies, and the proper dispute protocol to be exhausted by protestor prior to seeking remedy with a Federal agency.

Procurement Methods

Provided “full and open competition” occurs within the context of open competition. Four methods are available by which agencies may procure goods or services. Any procurement not exceeding a purchase price of five thousand dollars (\$5,000) shall be considered a small procurement and may be made in accordance with small procurement procedures promulgated by the AWIB under federal laws. Contracts exceeding an estimated purchase price of five thousand dollars (\$5,000) to twenty-five thousand dollars (\$25,000) shall be awarded by the Competitive Bids procurement method. Purchases exceeding twenty-five thousand dollars (\$25,000) shall be made using the applicable procurement method.

1) Small Purchase

- a) All small purchase procedures must use price or rate comparisons from an adequate (2 minimum) number of qualified sources
- b) Small purchases are appropriate only when
 - i) price is the overriding factor and may be easily quoted and compared
 - ii) delivery is standardized,
 - iii) performance outcomes are not dependent upon the content of the goods being procured, and
 - iv) made in one purchase transaction (see note** below).

Notes** Small purchases that exceed the \$5,000 limit shall not be split into incremental payments to allow for use within the small purchase method. Such purchase attempts will be deemed unauthorized and disallowed.

2) Competitive Bids

- a) Bids are publicly solicited, and the procurement is awarded to the lowest bidder, resulting in a fixed-price (either lump sum or unit price) contract.
- b) A grantee may solicit sealed bids under three (3) required conditions:
 - i) complete and realistic specification of required goods or services is available and part of the solicitation,
 - ii) there are at least two responsible bidders, and
 - iii) the procurement may be made principally on the basis of price.
- c) A grantee or subgrantee may award a firm fixed-price contract for complex technical specification such as Information Technology (IT) acquisitions.
- d) The requirements for use of competitive bids are specific:
 - i) Invitation for Bid (IFB) is publicly advertised and bids are solicited from an adequate (more than two) number of known suppliers
 - ii) IFB must contain all “specifications and pertinent attachments” and must define the items or services to be procured in sufficient detail for the bidders to respond properly
 - iii) All bids must be publicly opened;
 - iv) A firm fixed-price contract is awarded to the lowest responsive and responsible bidder; and
 - v) Any or all bids may be rejected if there is a documented reason.

Procurement Methods (Continued)

3) Competitive Sealed Proposals

- a) Competitive sealed proposal method seeks goods or services through a variety of methods that may be employed to achieve the results called for in the Request for Proposal (RFP).
- b) Competitive proposals are used when there is more than one prospective offeror, the lowest price is not necessarily the determining factor for award, and either a fixed-price or cost-reimbursement agreement will be awarded.
- c) Competitive sealed proposals involves:
 - i) Solicitation of proposals through a request for proposals (RFP) in which
 - (1) The request for proposals shall indicate the relative importance of price and other evaluation factors;
 - ii) Discussions with responsible offerors whose proposal have been determined to be reasonably susceptible to being selected for award and
 - (1) There shall be no disclosure of any information derived from proposals submitted by competing offerors that would provide any competitive advantage.
 - iii) An award made to the responsible offerors whose proposal is determined in writing to be the most advantageous considering price and evaluation factors set forth in the request for proposals and the results of any discussions conducted with responsible offerors.
- d) Competitive sealed proposals require:
 - i) Publication or RFPs within a reasonable manner, with a minimum of five days.
 - ii) Notice of the specifications that provide a general description of the proposed goods or services sought and
 - iii) Identification of all the evaluation factors and their relative importance or weight in selection of successful bidders.
 - iv) Solicitation of proposals from an adequate number of qualified sources.
 - v) A method for conducting technical evaluations of proposals and
- e) Evaluation factors may focus on approach, program design, innovation, coordination, and experience.
- f) Public notice of the request for proposals shall be given in the same manner as provided in ACA § 19-11-229(d), which refers to public notice of competitive, sealed bidding.
- g) A competitive sealed proposal may be cancelled, or any or all proposals may be rejected in writing by the agency.

Procurement Methods (Continued)

4) Competitive Sealed Bidding

- a) "Competitive sealed bidding" means a method of procurement which requires:
- i) Issuance of an invitation for bids with a purchase description and all contractual terms and conditions applicable to the procurement;
 - ii) Public, contemporaneous opening of bids at a pre-designated time and place;
 - iii) Unconditional acceptance of a bid without alteration or correction, except as authorized in ACA § 19-11-204 and 19-11-228 - 19-11-240;
 - iv) Award to the responsive and responsible bidder who has submitted the lowest bid meeting requirements and criteria set forth in the invitation for bids; and
 - iv) Public notice.
- b) Factors to be considered in determining whether competitive sealed bidding is not practicable shall include whether:
- i) Purchase descriptions are suitable for award on the basis of the lowest bid price and
 - ii) The available sources, the time and place of performance, and other relevant circumstances are appropriate for the use of competitive sealed bidding.
- c) When it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bids may be issued requesting two (2) successive items:
- i) the submission of unpriced technical proposals, then to be followed by
 - ii) an invitation for bids limited to those bidders whose technical proposals meet the requirements set forth in the first invitation.
- d) Notice inviting bids shall be given
- i) not fewer than five (5) calendar days nor more than thirty (30) calendar days preceding the date for the opening of bids by
 - (1) publishing the notice at least one (1) time in at least one (1) newspaper having general circulation in the state or
 - (2) posting by electronic media, but in all instances, adequate notice shall be given.
 - ii) The notice shall include a general description of the commodities, technical and general services, or professional and consultant services to be procured and shall state where invitations for bid may be obtained.
 - iii) The notice shall also state the date, time, and place of bid opening.

Procurement Methods (Continued)

- f) Bids shall be opened publicly in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids.
 - i) Each bid, together with the name of the bidder, shall be recorded and open to public inspection.
 - ii) Bids shall be evaluated based on the requirements set forth in the invitation for bids.
 - iii) These requirements may include criteria to determine acceptability such as:
 - (1) Inspection;
 - (2) Testing;
 - (3) Quality;
 - (4) Workmanship;
 - (5) Delivery;
 - (6) Past performance; and
 - (7) Suitability for a particular purpose and criteria affecting price such as life-cycle or total ownership costs.
- g) Bid Invitations: shall set forth the evaluation criteria to be used and no criteria may be used in bid evaluation that were not set forth in the invitation for bids.
- h) Contract Award: The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
- i) Notification to all Bidders: All other bidders requesting to be notified of the award decision shall be promptly notified of the decision.
- j) Excess of Available funds: If all RFPs exceed available funds as certified by the appropriate fiscal officer in situations in which time or economic considerations preclude resolicitation of work of a reduced scope, the Office of State Procurement may negotiate an adjustment of the bid price with the lowest responsive and responsible bidder, in order to bring the bid within the amount of available funds.
- k) Cancellation: An invitation for bid may be cancelled or any or all bids may be rejected in writing by the director or the agency.

Procurement Methods (Continued)

5) Proprietary or Sole Source Procurement (Noncompetitive Proposals)

- a) Solicitation of a proposal from a single source, or, after solicitation of a number (more than one) of sources, competition is determined inadequate to fulfill the requirements of the funding agency.
- b) Under regulations promulgated under State procurement laws and WIA guidelines, a contract may be awarded for a required or designated commodity or service to a sole or mandatory supplier when the Office of State Procurement Director, or a designee of the officer determines in writing that it is not practicable to use other than the required or designated commodity or service.
- c) The following requirements must be met:
 - i) The award is infeasible under one of the methods discussed above, and
 - ii) One of the following conditions apply:
 - (1) The item is available from only one source or hidden damages are present
 - (2) Public emergency precludes delay and requires the immediate acquisition of services. In this event quotes should be obtained if possible
- d) Agency Authorization: The Office of State Procurement may authorize the specific noncompetitive procurement (upon a formal request for approval)
- e) Competition is determined inadequate. (generally after a competitive process has been used and there are insufficient bidders).
 - i) Unless a written determination is made that there is only one (1) source for the required or designated commodity or service, efforts shall be made to obtain price competition such as:
 - (1) A cost analysis that includes verification of the proposed cost data and evaluation of the specific elements of costs and profits and
 - (2) A comparison with the agency's prior independent price estimate.
- f) Profit must be separately negotiated in the award, and cost plus a percentage of cost agreements are not allowable.
- g) Subgrantees may be required to submit the proposed noncompetitive procurement to their awarding agency (i.e., the State for formula subgrantees) for review or approval.

Note*: Noncompetitive procurements are allowable under 29 CFR 97.36, but they are considered a "last resort" option and used only when there is a documented reason for sole source selection. Grantees should ensure that the competitive process is open and fair and must exercise caution when using noncompetitive procurements.

Institutions of higher education, hospitals and other nonprofits, and commercial organizations that receive grants and subgrants under ETA-funded grant programs must follow the procurement standards of 29 CFR Part 95 found at 29 CFR 95.40-48.

Procurement Policies and Procedures standards to be employed under Part 95 and are described as follows:

- Each recipient/subrecipient must maintain written standards of conduct, including conflict of interest provisions and disciplinary actions for violations. The conflict of interest standards must also address the requirements of 29 CFR 667.200(a)(4) related to State and LWIB members.
- Each recipient must maintain a system that provides for full and open competition whenever practicable. Awards should be made based on a responsive bid or offer and the one most advantageous to the recipient after consideration of price, quality, and any other factors contained in the solicitation.
- Each recipient/subrecipient must establish written procurement procedures that provide for:
 - No purchases of unnecessary items
 - Analysis of lease vs. purchase options to determine the most “economical and practical” procurement; and
 - Solicitations that provide for the following.
 - Clear and accurate descriptions of the goods or services being procured. The description must not contain features that restrict competition.
 - All requirements that must be fulfilled and all other factors used in evaluating bids or proposals.
 - Technical requirements described in terms of functions to be performed or performance required, including a range of acceptable or minimum acceptable standards.
 - Specific features of “brand-name or equal” descriptions, if included in the solicitation
 - If procuring goods or certain types of services, the acceptability of metric measurements
 - Preference for ecologically sound and energy-efficient products.
 - Recipients are also responsible for the resolution of all contractual and administrative issues arising out of the procurements unless the issues concern violations of statute. Those matters are to be referred to the proper Federal, State, or local authority, as may have jurisdiction.
 - In addition, recipient/grantee procurement practices should encourage the utilization of small businesses, minority-owned firms, and women’s business enterprises whenever possible.

Procurement Methods

Section 29 CFR Part 95 does not prescribe specific methods for procurement, as does 29 CFR Part 97. The regulations require that procurements be conducted in a manner designed to provide full and open competition. [29 CFR 95.43] However, the four methods described earlier in this chapter are appropriate methods to procure both goods and services under the provisions of Part 95, with certain caveats:

1. The federal small purchase threshold for grantees and subgrantees is \$100,000. The small purchase threshold for LWIAs is \$25,000, which is applicable to all subgrants and subawards made with ETA funds.
2. While there is not a requirement for prior approval from the awarding agency, unless the awarding agency specifically requires such an approval for noncompetitive procurements, any such procurement is always subject to review by the awarding agency. [29 CFR 95.44(e)].
3. The type of agreement entered into by a grantee or subgrantee may be fixed price or cost reimbursement, depending on the method of procurement and goods or services being procured.
4. Each agreement funded by the ETA grant programs must contain the specific clauses referred to in 29 CFR 97.36(i), or 29 CFR 95.48, and Part 95, Appendix A, as appropriate. The following list is inclusive of all required contract clauses; however, not all clauses listed below are required for every type of grantee or subgrantee.
 - o For all contracts in excess of the small purchase threshold, administrative, contractual, or legal remedies where contractors violate or breach contract terms. The clause must also provide for sanctions or penalties, as appropriate.
 - o Termination for cause and for convenience by the awarding agency, including the process for exercising the clause and any basis for settlement (applies to contracts in excess of \$10,000 (Part 97) or contracts in excess of \$100,000 (Part 95))
 - o Access to records by the awarding agency, the grantee, the DOL, or the Comptroller General of the United States for the purposes of audit, examination, excerpts, and transcriptions (for other than small purchase transactions)
 - o Notice of awarding agency requirements and regulations related to reporting
 - o Notice of awarding agency requirements and/or regulations related to patent rights, copyrights, and rights in data
 - o Record retention requirements as specified in 29 CFR 97.42 or 29 CFR 95.53
 - o Compliance with Equal Employment Opportunity provisions in Executive Order (E.O.) 11246, as amended by E.O. 11375 and supplemented by the requirements of 41 CFR Part 60. These are codified for DOL programs at 29 CFR Parts 33 and 37.
 - o Compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 328 and 333) (all contracts in excess of \$2,500 that involve employment of mechanics or laborers and all construction contracts in excess of \$2,000)
 - o Compliance with the applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, E.O. 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (applies to contracts, subcontracts, and subgrants in excess of \$100,000)

Procurement Methods (Continued)

- o Mandatory standards and policies related to energy efficiency, which are contained in the State energy conservation plan issued in compliance with the Energy Policy Conservation Act (Public Law 94-163)
- o A provision requiring compliance with the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352). This requirement is also found in 29 CFR Part 93.
- o A provision requiring compliance with the debarment and suspension requirements (E.O. 12549 and 12689). This requirement is also found in 29 CFR Part 98.
- o Compliance with the provisions of the Davis-Bacon Act for construction contracts in excess of \$2,000.
- o A provision requiring compliance with the Copeland Anti-Kickback Act (construction and repair awards).
- o Grantees and subgrantees must also use the contract provisions to include other requirements of the WIA or other ETA grant program, as appropriate. These include provisions related to the following:
 - o Applicability of the appropriate ETA program and administrative regulations
 - o Audit requirements of 29 CFR Parts 96 and 99.

In addition to the requirements of 29 CFR Part 97 or Part 95, the following requirements apply to procurements and agreements funded under the WIA:

- o All agreements between LWIBs and units of government must be cost-reimbursement. [20 CFR 667.200(a)(3)] There is no provision for profit with governmental agencies.
- o If a fixed-price agreement with a governmental or nonprofit agency results in revenues in excess of actual costs incurred, the excess revenues are considered to be program income. [20 CFR 667.200(a)(6)] Any such fixed-price agreements should reference this requirement.
- o The local workforce investment plan must contain a description of the competitive process used to award grants and contracts under all programs funded under WIA Title I. The description must also include the process used to procure training services outside the ITA process. [20 CFR 661.350(a)(10)]
 - The procurement requirements for services to be provided under WIA Title IB Youth programs are specified in Section 123 of the Act. This section requires that activities and services for youth be competitively procured.
 - Small purchase procedures can be used to purchase a training slot for a youth at a training institution if allowable under the agency's procurement policy. Additional guidance on the procurement of youth services is found in TEGL 9-00, dated January 23, 2001; TEGL 12-01, dated February 21, 2002; and the WIA Youth Program RFP Guide (which may be downloaded from www.doleta.gov/youth_services/techassistance.asp).
 - The procurement requirements addressed in this chapter do not apply to the identification of eligible training providers. The process for identification of eligible training providers for training services under WIA Title IB programs is described in 20 CFR Part 663, Subpart E.

Procurement Methods (Continued)

- The State is responsible for the development and maintenance of a State-wide training provider list. While not a Federal requirement, each grantee should have a formal agreement for services when a training provider is to deliver services. This may be in the form of a purchase order, contract, voucher, or other mechanism that provides for payment information and may be incorporated or referenced in the individual ITAs. Payment of proposed training services listed in the ITA is covered in the One-Stop Comprehensive Financial Management Technical Assistance Guide, Chapter II-6, Cash Management.

Note: The distinguishing characteristics of subrecipients and vendors and a side-by-side comparison of characteristics to aid grantees/subgrantees to make the appropriate designation of subrecipients and vendors is located in the One-Stop Comprehensive Financial Management Technical Assistance Guide, Appendix E.*